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Supreme Court, U.S.
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No. 95-1451

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

Class of Lourdes Gutierrez, et. al.,
Petitioners,

v.

Santa Ana School District,
Rudy M. Castruita, Superintendent,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT/STATEMENT OF THE CASE

This case focuses exclusively on the effectiveness of public education, a matter reserved for the states. It poses the single question, long settled by California appellate law, of whether public school districts have liability in tort when their students fail to learn. All three California appellate decisions on this subject agree that school districts have no liability in tort for educational malfeasance. The social, political, economic and philosophical debate on the effectiveness of public schools is simply not legally significant. There is no federal question; there is no significant legal issue. This Court has no choice but to deny certiorari.

Petitioner Lourdes Gutierrez' class action lawsuit seeks money damages in tort against the Santa Ana Unified School District ("District") and a court order to close a public elementary school and divert state funds to the parents of the students on the erroneous theory that all students of Glenn Martin Elementary School have allegedly been "wrongfully and unlawfully" uneducated.

The Orange County Superior Court sustained the District's demurrer on the ground that the complaint failed to state a cause of action. The Court of Appeal affirmed and the California Supreme Court denied review. The decision merely reiterates established state law that educational malfeasance is not actionable. Under California law, there is no duty of care, as a matter of law and public policy, in the discharge of academic functions which would expose a school district to liability in tort. In the leading case, Peter W. v. San Francisco

Unified School District, 60 Cal.App.3d 814 (1976), the Court stated:

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might--and commonly does--have his own emphatic views on the subject. The "injury" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.
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> . . . . . .
>
> Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of school bond proposals, and in survey upon survey. To hold them to an actionable "duty of care," in the discharge of their

> academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers.

Id. at pp. 824-825.

To circumvent the refusal of California courts to establish tort liability for a failure to educate, Petitioners alleged a number of other causes of action, including misrepresentation, breach of contract, and constitutional violations. The Court correctly concluded that these causes of action were merely educational malpractice actions in thinly veiled disguise. Petitioners cannot create a non-existent legal theory of action merely by calling it something else.

Finally, Petitioners appear to raise issues under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1400 et seq.) and Section 504 of the Vocational Rehabilitation Act (29 U.S.C. § 794), which are federal statutes. However, this case presents no questions for this Court because Petitioners cannot state a cause of action under those statutes. Petitioners did not exhaust their administrative remedies as set forth in the IDEA as a prerequisite to filing a court action. Similarly, Petitioners, identified in the first amended complaint as all of the parents and children enrolled in Glenn Martin Elementary School, have not and cannot allege that they are disabled as that term is defined under the Rehabilitation Act. Thus they lack standing to sue under Section 504.

This case presents no federal question and is not legally significant. Certiorari must be denied.

THIS CASE PRESENTS NO BASIS FOR SUPREME COURT REVIEW

The United States Supreme Court accepts for review only cases involving important federal questions with broad public policy implications. This case does not begin to meet that test. It focuses exclusively on public education, an area reserved for state law. The decision in this case merely reiterates established California law that a public school district cannot be liable in tort for the alleged failure to teach students to read. Peter W. v. San Francisco Unified Sch. Dist., supra, 60 Cal.App.3d 814; Keech v. Berkeley Unified School Dist., 162 Cal.App.3d 464 (1984); Chevlin v. Los Angeles Community College Dist., 212 Cal.App.3d 382 (1989).

Rule 10 of the Rules of the Supreme Court of the United States sets forth specific reasons for which the Court will grant certiorari. None of those reasons applies here. The petition in this case challenges a state court decision, not a decision of a United States Court of Appeal. The state court in this case did not decide a federal question at all, much less in a way that conflicts with decisions of this Court or any other court. There is no basis for granting certiorari.

Petitioner's stated grounds for review, set forth in pages 5 through 9 of the Petition, are as follows:

> (a) a conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law is a strong reason for the granting of certiorari.
>
> . . . . . .
>
> (b) Even despite the absence of a conflict, state

court decisions involving the construction and application of federal statutes or treaties may be reviewed on certiorari where the question is sufficiently important.

. . . . . .

(c) Where a state court has decided a substantial and unsettled federal question arising under the Constitution and has rendered an erroneous or at least a doubtful decision on such a question, the Supreme Court should grant the petition for certiorari despite the absence of a conflict.

. . . . . .

(d) Where a state court has relied upon a prior Supreme Court decision, or a constitutional principle previously established by the Court, that is now considered ripe for reconsideration and possible overruling or change, certiorari may be granted.

. . . . . .

(e) Certiorari has also been granted to determine whether the state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation.

. . . . . .

(f) Certiorari may issue where the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution."

The briefest consideration of these grounds underscores the unsuitability of this case for review by this Court.

A. This Case Presents No Conflict Between A Decision Of the Highest State Court And A Supreme Court Decision On A Matter Of Federal Law

The question for the court in this case is whether a public school district has liability in tort for failing to teach a student to read. This is a state question, not a matter of federal law, and has been settled definitively in three California appellate court decisions. Even were it a federal question, however, there are no California or United States Supreme Court decisions on this issue. Therefore, this Court has no reason to grant certiorari.

B. The Decision In This Case Does Not Involve The Construction And Application Of Federal Statutes Or Treaties

As his second justification for review by this Court, Petitioners allege that "Respondents' bad faith school-wide policies deprive the elementary school students of the educational opportunity" under the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act. (Petition, p. 6.) Even if this statement were true, which is not the case, Petitioners cannot litigate these federal causes of action in state or federal court because they failed to meet the threshold requirements under the IDEA for bringing the matter to court.[1/] Moreover, as a class defined in the complaint as all

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[1/]To initiate a class action under the IDEA plaintiffs must allege the following: (1) all class members are disabled within the meaning of the IDEA as implemented by the California Education Code and the implementing regulations. Education Code section 56000 et seq.; California Code of

the parents and students of Glenn Martin Elementary School, Petitioners have not alleged, nor can they, that they are "disabled" as that term is defined in the Rehabilitation Act. (34 C.F.R. § 104.3 (j).) Therefore, they have no standing to sue under Section 504. That is why the Superior Court judge sustained Respondents' demurrers without leave to amend and why the Court of Appeal affirmed.

C. The Court In This Case Did Not Decide A Substantial And Unsettled Federal Question

The Court in this case reiterated long established state law precedent that a California public school district has no liability in tort for failing to educate its students. This is not a federal question, nor is it unsettled. Petitioners' attempt to disguise their educational malpractice case as a violation of equal protection and due process is not effective. The Court of Appeal stated that these trumped up constitutional causes of action boiled down to educational malpractice and were not actionable. Opinion by the Fourth Appellate District, California Court of Appeal ("Opinion"), See pp. 9-12 of **Appendix to Respondents' Brief in Opposition** for the full text of the Court of Appeal Opinion in this case. Petitioner's Appendix is inaccurate and misleading because it does not include the full text of the Opinion.

Regulations, title 5, section 3030 et seq.; (2) all class members have exhausted their administrative remedies, or to do so would be futile; and (3) all class members are aggrieved parties as a result of the findings and decisions of a due process hearing. 20 United States Code section 1415, subdivision (e)(2).

D. The Court In This Case Did Not Rely Upon Any Prior Supreme Court Decision Now Ripe For Reconsideration

The Court of Appeal in this case relied exclusively for its decision upon three other California appellate decisions, not upon a decision of this Court. Moreover, Petitioner cites to no prior Supreme Court decision which is ripe for reconsideration. Respondents are puzzled as to why Petitioner chose this ground as a basis for review in this case.

E. The Court In This Case Relied Primarily Upon State Appellate Law, Not Supreme Court Decisions

As discussed above, the Court in this case relied upon state law precedents holding that educational malpractice is not actionable, not Supreme Court decisions. The Court rejected Petitioner's "jumble of state and federal constitutional violations" and found that these causes of action "all boil down to a claim for inadequate education." See Opinion, **Appendix to Respondents' Brief in Opposition**, p. 9.

In finding that Petitioners' constitutional causes of action fail to state facts sufficient to be actionable, the Court of Appeal properly interpreted and applied federal case law, including Supreme Court decisions. The Court of Appeal affirmed the sustaining of the demurrer to the cause of action for violation of the equal protection clause because Petitioner had not and could not allege the essential element that persons similarly situated are singled out for unequal treatment on an impermissible basis. The Court of Appeal pointed out that "Gutierrez has failed to

allege that Roberto and the class are treated differently from students similarly situated within the District. . . . When a handicapped child does not allege that he has been singled out or treated differently from the nonhandicapped child, but rather needs additional special services, the fourteenth amendment is rarely implicated." Opinion, **Appendix to Respondents' Brief in Opposition**, p. 10, quoting Gallagher v. Pontiac School Dist., 807 F.2d 75 (6th Cir. 1986).

In ruling that Petitioners had failed to allege violation of a fundamental right, the court properly relied upon San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35-36 (1973) for the proposition that education is not guaranteed under the federal constitution. Under California law, the fundamental right to education has been interpreted by the California Supreme Court as the right to equality of funding or access to education, not the right to a particular standard or quality of education. Serrano v. Priest, 18 Cal.3d 728, 767-768 (1976); Butt v. State of California, 4 Cal.4th 668, 686 (1992). See Opinion, **Appendix to Respondents' Brief in Opposition**, p. 11. Petitioners' argument that they have a fundamental right to a particular standard of education is not supported by state or federal law.

Petitioners' due process cause of action is not actionable because Roberto and his fellow students were not denied an education. Petitioners' challenge to the quality of their education does not reach a constitutional level under either state or federal law.

The court in this case followed without comment all of the Supreme Court cases it cited in its decision in this case,

including San Antonio Independent School District v. Rodriguez, 422 U.S. 1 (1973), the case Petitioners cite so frequently. There is no conflict, no legal debate between state and federal courts, no issue of legal significance. There is no basis whatsoever for certiorari.

F. The Decision In This Case Presents No Important Questions Touching The Accommodation Of State And Federal Interests

This case, as argued by Petitioners, touches on state and federal issues. But the issues are of no legal significance. As discussed above, the causes of action based on the IDEA and Section 504 of the Rehabilitation Act fail on their face because Petitioners did not exhaust their administrative remedies nor meet other threshold requirements for filing a lawsuit under those statutes. (See discussion of constitutional issues under Section E above.)

THE QUESTIONS PRESENTED BY PETITIONERS DO NOT MERIT SUPREME COURT REVIEW

Petitioners present five confused, rambling issue statements, which further emphasize the inappropriateness of certiorari in this case. (Petition, p. ii - v.) Moreover, as discussed below, many of these "questions" are not raised by the case.

Question 1. *Does the U.S. Constitution grant elementary school students the chance to acquire the academic building blocks, which would then enable them the genuine opportunity to participate in the political, social and economic*

processes of our society?

This case does not raise the question of a child's chance or opportunity to receive a public education. All of the Petitioners who were minors were attending classes in Glenn Martin Elementary School. That is how the class was defined. Petitioners attempt, however, to go beyond the chance for an education and ask this Court somehow to improve the effectiveness of public education through a legal ruling. That question is beyond the jurisdiction of this Court.

Question 2. Despite the Rowley decision, the U.S. Supreme Court has never adequately defined what exactly is an educational benefit. Such exactitude is necessary for a proper analysis of what exactly is to be conferred upon disabled, elementary school students.

This is not the case to bring this particular question before the Court, even if the Court had jurisdiction to define "educational benefit." Petitioners include all of the parents and all of the students at Glenn Martin Elementary School. They are not all disabled as defined by the IDEA and Section 504 and they did not exhaust their administrative remedies. Thus they cannot raise issues under these two statutes. This Court cannot reach question number 2.

Question 3. Although the United Supreme Court has carefully declined to address the issue of whether Section 504 creates a private right of action, the Circuit Courts of Appeal which have addressed the issue have uniformly upheld existence of such a Right. Clarity is needed on this issue.

Once again this case does not present this particular issue to the Court. In order to establish a claim under Section 504 of the Rehabilitation Act, Petitioners must allege that (1) the District receives federal funds; (2) all class members are individuals with disabilities as that term is defined under the Rehabilitation Act, and that they are otherwise qualified to receive benefits and participate in the federal program; and (3) class members have been excluded from the benefits of the program solely because of their disabilities. (Sullivan v. Vallejo City Unified School Dist., 731 F.Supp 947, 957 (E.D. Cal. 1990).)

An individual is disabled and subject to the protections of the Rehabilitation Act only if the individual (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 34 C.F.R. § 104.3 (j).

Petitioners have never alleged and never argued in their numerous, lengthy briefs that they meet the definition of disabled under Section 504. Thus, any question of a right of action under this statute is not at issue here.

Question 4. *Does wanton elementary instruction and willful non-assessment of elementary school students under IDEA, constitute violations of the guarantees of equal protection, procedural and substantive due process under the 14th Amendment to the United States Constitution since it is uncontested that the state of California has chosen to provide a system of education to the residents of California and the 14th Amendment requires that a state which has undertaken to*

provide the opportunity of an education made that opportunity available to all on equal terms--especially when the California Constitution states education is a fundamental right?

With this issue, Petitioners appear to be questioning whether alleged "wanton elementary instruction" at a particular California elementary school and violations of the IDEA procedures are constitutional violations.

Since this Court has held in San Antonio Independent School Dist. v. Rodriguez, supra, 411 U.S. at pp. 35-36 that the right to an education is not guaranteed under the United States Constitution, the quality of that education is certainly not constitutionally protected under federal law.

Moreover, this court could not reach the question of whether alleged violations of the IDEA are unconstitutional because Petitioners never met the pleading requirements of an action under the IDEA. Primarily they did not exhaust their administrative remedies, which means that they did not first litigate this matter at a due process hearing. 20 U.S.C. § 1415, subd. (e)(2).

Question number 4 raises no significant legal questions for the Court even if it were ripe for adjudication.

Question 5. *Despite state case law and various government codes, it is illegal and unconstitutional for school districts and their employees to:*

(a) engage in bad faith school-wide policies which deprive the elementary school students of

the educational opportunity to which they are constitutionally and statutorily entitled under IDEA and section 504 of the Rehabilitation Act; and

(b) willfully and in bad faith refuse teachers' recommendations that a student's learning disabilities be assessed to the extent that teachers are forced to send notes home with the children to have parents request that their children be assessed for learning disabilities; and

(c) refuse to assess students when their parents request assessment; and

(d) if the student is diagnosed with a disability, as Roberto was, Respondents cannot refuse or unjustifiably delay to develop a special education program for the student; and

(e) fail to inform or, in fact, misinform parents of their children's progress by (i) refusing to provide the students' low CTBS scores which are addressed specifically to the parents; and (ii) simultaneously giving these students A's and B's in these subjects when CBTS scores indicate they're in the bottom percentages nation-wide; and

(f) conduct an age promotion policy which pushes the students--like herds of cattle--to the next grade despite their illiteracy.

This question, as with all the others, raises issues of the effectiveness of public education and abstract rights under the IDEA and Section 504. The effectiveness of public education is a social, philosophical, economic, and political issue; it is not a legal issue for the Supreme Court.

As discussed repeatedly throughout this brief, Petitioners failed to meet the threshold requirements of the IDEA and Section 504. This Court cannot therefore address issues raised as to perceived violations of those statutes by the District.

CONCLUSION

This case raises state law issues regarding public education and presents no federal question. Certiorari is inappropriate and must be denied.

Dated: March 22, 1996 Respectfully submitted,

BREON, O'DONNELL
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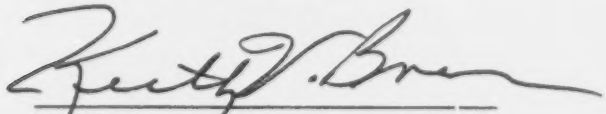
KEITH V. BREON
NANCY B. BOURNE



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IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CLASS OF LOURDES GUTIERREZ, etc. et al.	)	G013841
	)	(Super. Ct. No. 697402)
Plaintiffs and Appellants,	)	
v.	)	OPINION
SANTA ANA UNIFIED SCHOOL DISTRICT, et al.	)	
Defendants and Respondents.	)	

Appeal from a judgment of the Superior Court of Orange County, David H. Brickner, Judge. Affirmed.

Emir Phillips and Eleanor Oths for Plaintiffs and Appellants.

Breon, O'Donnell, Miller, Brown & Dannis, Keith V. Breon, Nancy B. Bourne, Bridget A. Flanagan and Laurie S. Juengert for Defendants and Respondents.

Lourdes Gutierrez filed this action against the Santa Ana Unified School District and its superintendent, Rudy Castruita, on behalf of a class consisting of her son, Roberto Gutierrez, and all students and parents of students of Glenn Martin Elementary School. The first amended complaint alleges negligent instruction, misrepresentation and a host of constitutional and statutory violations; it seeks compensatory and punitive damages, declaratory and injunctive relief, and attorneys fees. The trial court sustained the demurrers of the school district and Dr. Castruita (the District) without leave to amend, on the grounds that the complaint failed to state facts sufficient to constitute a class action lawsuit and failed to state any cognizable cause of action. We affirm.

This action arises out of the frustration and anger felt by Lourdes Gutierrez because her son, Roberto, emerged from five years of instruction at Glenn Martin public elementary school as a functional illiterate in the English language. The complaint alleges the District failed to instruct minimal skills and failed to test, evaluate or remedy Roberto's learning disabilities, resulting in irreparable injury. Claiming Roberto's case is indicative of all students at Glenn Martin and that she is able to protect their interests, Gutierrez asks the court to issue an injunction closing Glenn Martin and giving the operating funds to the parents in the form of vouchers for private education. She also seeks an order requiring the District to notify all parents of their rights and their children's standardized test scores. On behalf of Roberto individually, she asks for compensatory and punitive damages and attorney fees.

The first amended complaint sets out Roberto's

educational experience in some detail. While Roberto was enrolled in kindergarten through second grade, Gutierrez was informed of Roberto's problem with spelling, but she was otherwise reassured about his progress. During Roberto's third grade year, however, the family moved to the City of Corona for three months, where he attended John Adams Elementary School. There, Roberto was tested because of an "illiteracy problem", and it was discovered that he had a first grade reading level. An individualized educational program (IEP) was intiated for Roberto.

When the family returned to Santa Ana (and Glenn Martin), Gutierrez, unaware that the IEP process had been started at John Adams and the documentation had been transferred to Glenn Martin, asked the principal to initiate its own IEP. She was repeatedly promised an IEP but nothing was done for almost one year. She was told Roberto needed help in reading, writing and spelling and that special classes would be developed for Roberto, but nothing was done. Finally, at the insistence of Roberto's third grade teacher, Roberto was evaluated by a district psychologist, Dr. Ramon.

When Roberto was enrolled in the fourth grade, Dr. Ramon met with Gutierrez; he informed her Roberto was "a strong and smart boy but had never been taught correctly," and his problems could have been overcome. Roberto's fourth grade teacher finally explained to Gutierrez that she needed to sign a form to legally obligate Glenn Martin to conduct an IEP within 60 days. At the ensuing IEP hearing, Dr. Ramon changed his conclusions and stated Roberto's problems arose from auditory and visual problems. Confused by the discrepancies in Dr. Ramon's opinions, Gutierrez

requested another IEP to be conducted by an independent psychologist. The independent psychologist, Adela de la Torres, concluded Roberto's deficiencies were caused by the improper instruction of English.

When the first amended complaint was filed, Roberto was repeating the fourth grade and attending special classes three hours a day. He was "humiliated by his illiteracy."

Gutierrez alleges the District has a "no retention" policy that requires students to be promoted to the next grade level based on their age rather than their abilities. This policy discourages teachers from identifying and testing students with learning disabilities, preparing remedial programs for them, and accurately assessing their skills and communicating the assessments to parents. Parents receive no notification or explanation of poor scores on the California Test of Basic Skills (CTBS) while their students receive passing grades on their report cards. Thus, parents are erroneously assured their children can read and write English. Furthermore, parents are not informed of forms requiring their signatures to retain a child or to initiate an IEP.

Based on these facts, Gutierrez alleges 10 causes of action. The first is for negligence in: failing to discover Roberto's reading and writing disabilities; allowing him to pass to the next grade level; assigning him to classes and instructors not suited to his needs; failing to inform parents of their children's educational progress; and failing to promulgate a minimum course of instruction and minimum standard of proficiency to pass each grade. Roberto's damages include learning deficiencies which have rendered

him handicapped, psychological harm, his diminished earning capacity, and the costs of a tutor.

The second cause of aciton is for intentional misrepresentation to the parents that the students were performing at or near grade level when in fact they were seriously below grade level and in need of remedial instruction. The parents relied on these misrepresentations and failed to obtain remedial instruction for their children. The District also intentionally failed to disclose the students' poor CTBS scores to the parents. The damages alleged are personal to Roberto and the same as the first cause of action. Gutierrez also seeks punitive damages.

The third cause of action repleads the second in the form of negligent misrepresentation. The fourth cause of action is for intentional infliction of emotional distress. The fifth cause of action is for breach of implied contract between the taxpayers and the state, of which Roberto is an alleged third party beneficiary.

In the sixth cause of action, Gutierrez alleges the District has violated the United States Constitution by denying Roberto and members of the class equal educational opportunities, and by failing to provide them with "an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and for full participation in the political process." Gutierrez also alleges a deprivation of the class members' right to liberty by "forcing them to attend Glen [sic] Martin Elementary School" without providing them the opportunity to acquire minimal skills.

The seventh cause of action alleges violations of the California Constitution by the deprivation of the class members' "fundamental rights to education," the denial of equal educational opportunities and their rights to liberty.

The eighth cause of action alleges a violation of the District's statutory duty under the Education of All Handicapped Children Act (IDEA)[1/] by not providing a free and appropriate education to all handicapped children. The ninth cause of action alleges violations of the Rehabilitation Act by failing to adhere to proscribed regulations and federal and state policies regarding educational rights of handicapped children. And the tenth cause of action alleges a violation of 42 United States Code section 1983 for discrimination against handicapped children.

I. Claims Based On Educational Malpractice

The theory underlying Gutierrez' first cause of action for negligence, educational malpractice, has been rejected by the appellate courts. In ***Peter W.* v. *San Francisco Unified Sch. Dist.*** (1976) 60 Cal. App.3d 814, the plaintiff, who had recently graduated from high school following twelve years of public instruction, alleged negligence against the school district in terms remarkably similar to those in the complaint before us. He claimed school officials failed to provide him with adequate instruction by failing to discover his reading disabilities, passing him to higher levels without the requisite competency, and assigning him to classes and teachers unsuited to his needs. The

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[1/]EAHCA was amended in 1990 and is now known as the Individuals with Disabilities Education Act (IDEA).

court analyzed the pleading in terms of whether there was a legal duty of care, the breach of which would sustain a cause of action for negligence.

After establishing that the existence of a duty of care presents a pure question of law, the court stated, "[J]udicial recognition of [a] duty in the defendant, with the consequence of his liability in negligence for its breach, is initially to be dictated or precluded by considerations of public policy." (*Id.* at p. 822.) The traditional policy considerations when contemplating a new area of tort liability led the court to conclude no duty of care could exist: "We find in this situation no conceivable 'workability of a rule of care' against which defendant's alleged conduct may be measured [citation], no reasonable 'degree of certainty that . . . plaintiff suffered injury' within the meaning of the law of negligence [citation], and no such perceptible 'connection between the defendant's conduct and the injury suffered,' as alleged, which would establish a causal link between them within the same meaning. [Citation.]" (*Id.* at p. 825.)

The court found that practical considerations also weighed heavily against an actionable duty of care in educators. "Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of

school bond proposals, and in survey upon survey. To hold them to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims -- real or imagined -- of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. [Citations.] The ultimate consequences, in terms of public time and money, would burden them -- and society -- beyond calculation." (***Ibid.*** see also, ***Chevlin* v. *Los Angeles Community College Dist.*** (1989) 212 Cal.App.3d 382.)

Gutierrez urges us to disagree with ***Peter W.***, arguing the issue is really a question of proximate cause for the jury, i.e., was the District's negligence a substantial factor in Roberto's illiteracy? But this approach presents the same pitfalls inherent in the duty analysis: "The 'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified." (***Peter W.* v. *San Francisco Unified Sch. Dist., supra,*** 60 Cal.App.3d at p. 824.) We agree with the ***Peter W.*** court and decline to create an actionable duty of care in those who administer the academic phases of the public educational process.

The fifth cause of action, for breach of implied contract, has also been rejected by previous decisions as a thinly disguised claim for educational malpractice. In ***Chevlin***, the plaintiff sued

the community college district after she was terminated from its nuclear medicine technology program and from her employment as a program intern, alleging multiple causes of action including negligence and breach of contract. The defendant had entered into affiliation agreements with the hospitals and, like Gutierrez, the plaintiff asserted she had standing as a third-party beneficiary. The court distinguished ***Zumbrun* v. *University of Southern California*** (1972) 25 Cal.App.3d 1, where a studednt was permitted to seek recovery for tuition and other fees under a breach of contract theory because one of her instructors refused to teach the final month of a class in protest of the United States' invasion of Cambodia. "Here, however, Chevlin is suing a public institution and seeking compensatory damages for her inability to find employment as a nuclear medicine technologist. We think it obvious that to permit Chevlin to recover under a breach of contract theory based on educational nonfeasance would be tantamount to permitting her to sue for negligence which is precluded under the ***Peter W.*** decision. Whether framed as a negligence or breach of contract theory the harm which Chevlin seeks to redress is the same." (***Chevlin* v. *Los Angeles Community College Dist.***, *supra*, 212 Cal.App.3d at p. 390.) The same rationale applies here.

II. Claims Based on Constitutional Violation

In the sixth and seventh causes of action, Gutierrez alleges a jumble of state and federal constitutional violations. But they all boil down to a claim for inadequate education.

A. Equal Protection

Gutierrez apparently claims a violation of the equal protection clauses of the state and federal constitutions by alleging that Roberto and members of the class have been denied "equal educational opportunity." An essential allegation of an equal protection violation under both state and federal law is that persons similarly situated are singled out for unequal treatment on an impermissible basis. (***City of Cleburne* v. *Cleburne Living Center, Inc.*** (1985) 473 U.S. 432; ***Educational & Recreational Services, Inc.* v. *Pasadena Unified Sch.Dist.*** (1977) 65 Cal.App.3d 775, 785; ***Smith v. Philadelphia School Dist.*** (E.D.Pa. 1988) 679 F.Supp. 479.) But Gutierrez has failed to allege that Roberto and the class are treated differently from students similarly situated within the District. In fact, she alleges the existence of a district-wide policy of promoting students to higher grades based on age rather than ability. In ***Gallagher* v. *Pontiac School Dist.*** (6th Cir. 1986) 807 F.2d 75, the court rejected a similar challenge from a deaf child who claimed he was denied an education commensurate with his needs. "[Gallagher] never explains how he was treated any differently from any similarly situated students. The essence of his claim does not constitute a valid equal protection challenge. When a handicapped child does not allege that he has been singled out or treated differently from the nonhandicapped child, but rather needs additional special services, the fourteenth amendment is rarely implicated." (***Id.***, at p. 79, emphasis omitted.)

Gutierrez also attempts to bolster her equal protection claim by contending she has alleged the denial of a fundamental right, thus subjecting the District policies to strict scrutiny.

Although the right to an education is not guaranteed under the federal constitution (***San Antonio Independent School District* v. *Rodriguez*** (1973) 411 U.S. 1, 35-36), it is a fundamental right under the California Constitution (***Serrano* v. *Priest*** (1976) 18 Cal.3d 728, 767-768). But that right has been interpreted as the right to equality of funding or access to education, not the level of quality. (***Ibid; Butt* v. *State of California*** (1992) 4 Cal.4th 668.) In ***Butt***, the Supreme Court made that clear: "Of course, the Constitution does not prohibit all disparities in educational quality or service. Despite extensive State regulation and standardization . . ., the experience offered by our vast and diverse public school system undoubtedly differs to a considerable degree among districts, schools, and individual students. These distinctions arise from inevitable variances in local programs, philosophies, and conditions. '[A] requirement that [the State] provide [strictly] "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons . . .' [Citation.] Moreover, principles of equal protection have never required the State to remedy all ills or eliminate all variances in service." (***Butt* v. *State of California, supra,*** 4 Cal.4th at p. 686.)

B. Due Process

Gutierrez claims her allegations demonstrate that Roberto and members of the class were denied substantive and procedural due process because they were forced to attend a school where they failed to learn. Citing ***DeShaney* v. *Winnebago Cty.Soc.Servs.Dept.*** (1989) 489 U.S. 189, she claims that the students were deprived of liberty without due process. But ***DeShaney*** discusses deprivations of liberty

resulting in the denial of basic human needs: "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- e.g., food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." (***Id.*** at p. 200.) Compulsory school attendance laws do not create a special relationship between the student and the school. (***Graham* v. *Independent Sch. Dist.*** (10th Cir. 1994) 22 F.3d 991, 994.)

Gutierrez also claims the District has taken away the students' "legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause . . ." (***Goss* v. *Lopez*** (1975) 419 U.S. 565, 575.) Unlike the situation here, however, the constitutional affront in ***Goss*** was a student's total exclusion from the educational process during a 10-day suspension imposed without a hearing. The court found the right to an education extended by the state could not be withdrawn "on grounds of misconduct absent[] fundamentally fair procedures to determine whether the misconduct has occurred." (***Ibid.***)

III. Claims Based On Violations of Statutory Duties

A. Individuals With Disabilities Education Act

Gutierrez's eighth cause of action alleges a violation of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.). IDEA is designed to "assure that all children with disabilities have available to them . . . a free

appropriate public education which emphasizes special education and related services designed to meet their unique needs . . ." (20 U.S.C. § 1400, subd.(c).) We seriously question whether all children at Glenn Martin Elementary School (the proposed class) or even Roberto individually fit within the definition of children with disabilties under the act.[2/] But in any event, Gutierrez has failed to allege the required element that Roberto (or the class members) has exhausted his administrative remedies. The statute expressly provides that the right to bring a civil action in state or federal court obtains only to a plaintiff who is aggrieved as the result of the findings and decision of a due process hearing conducted by the state educational agency. (20 U.S.C. § 1415, subds. (b)(2), (c), (e)(2). See also, ***Buffallo v. Bd. Of Educ. Of Sachem Cent. Sch.D.*** (E.D.N.Y 1990) 729 F.Supp. 240.)

Gutierrez does not claim Roberto or any other class member has exhausted his administrative remedies; but she argues it would be futile to do so because "[t]he school has limited hearing officers and it would take years to adjudicate hundreds of Plaintiffs' claims to an appeal level." This, of course, is mere speculation which does not suffice to excuse the

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[2/] The definition of "children with disabilities" includes children with "specific learning disabilities . . .[¶] who, by reason thereof, need special education and related services." (§ 1401, subd. (a)(1)(A).) "Children with specific learning disabilities" is defined as "those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, speak, think, read, write, spell, or do mathematical calculations," but the definition specifically excludes "children who have learning problems which are primarily the result of . . . environmental, cultural, or economic disadvantage." (§ 1401, subd. (a)(15).)

exhaustion of administrative remedies for the class as a whole. (***Jackson* v. *Fort Stanton Hosp. & Training School*** (D.N.M. 1990) 757 F.Supp. 1243, 1304, revd. on other grounds (10th Cir. 1992) 964 F.2d 980.) Furthermore, a due process hearing for Roberto was scheduled to take place during the pendency of this appeal,[3/] demonstrating that his claim under IDEA was premature, at best.

B. Rehabilitation Act of 1973

Similarly, Gutierrez's ninth cause of action under the Rehabilitation Act of 1973 (29 U.S.C. § 794)[4/] fails for lack of exhaustion of administrative remedies. When seeking relief by way of a civil action under the Vocational Rehabilitation Act that is also available under the IDEA, a plaintiff must exhaust administrative remedies to the same extent as is required under IDEA. (20 U.S.C. § 1415, subd. (f); ***Calhoun* v. *Illinois State Bd. Of Educ., Etc.*** (N.D.Ill. 1982) 550 F.Supp. 796.)

[3/] This court has taken judicial notice of the notice of hearing issued by the Special Education Hearing Office scheduling a due process hearing in Roberto Gutierrez v. Santa Ana Unified School District (SN 407-93) for October 7 and 8, 1993. (Evid. Code, § 452, subd. (c).)

[4/] The purpose of the Rehabilitation Act is to assure that federally assisted programs and activities are operated without discrimination on the basis of disability. (29 U.S.C. § 794.) A claimant under the Act must be disabled such that he has a physical or mental impairment which substantially limits a major life activity. (34 C.F.R. § 104.3 (j).) Gutierrez's unsupported assertion that severe functional illiteracy meets this definition is not plausible.

C. 42 United States Code section 1983

Gutierrez also attempts to state a claim under 42 United States Code section 1983 of the Civil Rights Act. To be entitled to relief under this section, a plaintiff must show that a person acting under color of state law acted to deprive him of a constitutional right. (***Mason* v. *Waukesha County*** (E.D. Wis. 1994) 855 F.Supp. 282, 285.) As discussed above, Gutierrez has not done this. Absent the effective pleading of an independent constitutional violation, she cannot seek redress for the denial of an appropriate education under the Civil Rights Act. A plaintiff cannot "circumvent the procedural requirements of the two comprehensive statutes dealing with handicapped individuals [IDEA and the Rehabilitation Act] by going directly . . . under § 1983 to obtain an adjudication that [she] had been denied the benefits of those statutes." (***Austin* v. *Brown Local School Dist.*** (6th Cir. 1984) 746 F.2d 1161, 1166.)

IV. Miscellaneous claims

Gutierrez's second and third causes of action, for intentional and negligent misrepresentation, are barred by Government Code section 818.8, which grants immunity to a public entity for injuries caused by misrepresentations of its employees, whether intentional or negligent. (***Chevlin* v. *Los Angeles Community College Dist.*, *supra***, 212 Cal.App.3d at p. 390.)

Gutierrez does not argue her fourth cause of action, for intentional infliction of emotional distress, should have survived the demurrer; thus she has waived any error on appeal. It is

clear, however, that she has failed to allege any facts to support the requisite outrageous conduct or the intent to cause severe emotional distress. (***Cervantes* v. *J.C. Penny Co.*** (1979) 24 Cal.3d 579, 593.)

Gutierrez makes no argument or showing that she can amend to cure these pleading deficiencies; because none of the causes of action survive as to Roberto individually, we need not discuss the propriety of the class action. Accordingly, the judgment is affirmed.

/s/ WALLIN
WALLIN, ACTING P.J.

WE CONCUR:

/s/ SONENSHINE
SONESHINE, J.

/s/ CROSBY
CROSBY, J.